A. Prohibiting All Carriers From Serving A Building Constitutes A Taking.

As set forth in our Further Comments, the Takings Clause provides absolute protection against uncompensated *per se* takings, including the government overriding a property owner's right to exclude others from his property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Despite this, SBPP makes two illogical claims: (1) that a rule that would exclude all carriers – by preventing them from serving a noncomplying building – does not effect a taking; and (2) that such a rule would not compel building owners to comply in a manner that would effectively constitute a taking.[70]

SBPP's arguments, however, put the cart before the horse. They assume that FCC regulation is the natural order of things and ignore the effect of regulation on the preexisting property rights of building owners. A rule prohibiting any telecommunications provider from serving a building that does not grant nondiscriminatory access to all telecommunications providers still effectively overrides the building owner's constitutionally protected right to exclude *some* carriers from the building. That right exists now, it is protected by the Fifth Amendment, and it would be lost if the Commission adopted SBPP's proposals. Similarly, if a government rule compels compliance to avoid the destruction of the market value of a building, compliance cannot be said to result from market conditions: the regulation itself creates the market conditions, and therefore creates the taking. SBPP's arguments are pure sophistry and betray the weakness of SBPP's position.

Several parties have argued that the FNPRM raises at most a regulatory taking issue, not a *per se* taking issue, by erroneously relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, mobile home park owners challenged a rent control ordinance imposed by California,

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[70] SBPP Comments at 17-18.

asserting that it amounted to a physical occupation of their land. The Supreme Court rejected that argument, holding that limiting the bases upon which mobile home park owners could terminate a mobile home owner's tenancy did not amount to a physical invasion since the park owners had voluntarily rented their land to the mobile home owners in the first place, and the ordinance did not require the park owners to continue to rent their property to mobile home owners. *Id.* at 528.

The Court's holding in *Yee*, however, is inapposite to the Commission's proposed rule. First, *Yee* is distinguishable on its face. Unlike the FNPRM's proposal, the ordinance in *Yee* did not require the park owners to rent spaces to any mobile home owner just because it chose to rent to one mobile home owner. Thus, *Yee* is at best applicable only by analogy, and as an analogy, it is unconvincing.

In *Yee*, in response to the ordinance to which they objected, the park owners were not only free to discontinue renting their property to mobile home owners, but after those tenants were removed, they could instead put what would be vacant land to another use. While it is true that the proposed rule would not "require" building owners to grant all telecommunications providers access to their property, a decision by an owner not to do so would prevent *any* telecommunications provider from providing services to the building, thereby destroying the economic value of the building — no tenant would rent space in an office building that did not have telephone service.

Thus, if the FNPRM proposal is adopted, a building owner would have to choose one of three draconian options: (1) comply with the rule by providing nondiscriminatory access to all providers and thereby consent to the taking of its property; (2) refuse to provide nondiscriminatory access, thereby destroying the economic value of the building; or (3) raze the

building and locate another money-making enterprise on their property which either (a) is not covered by the FNPRM or (b) does not need telephone services. While the third option may seem theoretically to squeeze this situation into the exception that was critical to the Court's decision in *Yee*, it does not do so practically. A commercial office building or an apartment building is not vacant land and, having to raze either represents a drastic — and unacceptable — price to pay. Therefore, the appropriate analysis is of the regulation is as a *per se* taking, not as a regulatory taking, since the effect of the rule would be to require building owners to submit to a physical invasion of their property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 527 (1982).

B. SBPP's Comments Demonstrate That The Value Of The Taking That Would Be Effected By The Commission Regulation Would Amount To Billions Of Dollars.

The rule set forth in the FNPRM improperly values the benefit that telecommunications providers would obtain by nondiscriminatory access to buildings. While some comments have suggested that requiring providers to pay building owners compensation would satisfy the government's liability under the Takings Clause, it would not. Two reasons as to why such a requirement is insufficient were detailed in our opening comments — "(1) the Commission lacks the requisite statutory authority to engage in a taking and to establish a compensation mechanism to be funded by the carriers; and (2) even if the Commission had such authority, the Notice has failed to specify a compensation mechanism that would satisfy Takings Clause requirements."[71] As further explanation as to why the FNPRM has failed to specify a compensation mechanism that would satisfy Takings Clause requirements, and to refute those comments that argue that the mechanism set forth in the FNPRM is sufficient, one additional example is useful.

It has been suggested that appropriate compensation would be based on the square foot rental the owner obtained in the building and the amount of space a carrier would use inside the building. This formula would not fairly compensate the building owner, however, since the value of providing access to the building is not simply being able to use the square footage made available to the carrier, but to gain access and provide services to the tenants in the building who use telecommunications services.

The following example illustrates this point. Suppose that the Commission imposed a requirement that if the recent NBA All-Star Game permitted one LEC to advertise by placing a two-foot by three-foot banner in the MCI Center, it would have to permit all LECs to advertise by placing a two-foot by three-foot banner in the MCI Center — and that the charge would be based on the size of the banner and a fair rental rate based on the rental charge that the MCI Center was charging the NBA to use the facility. The value to the LECs of advertising is not based on the square foot rental charge of the MCI center, but rather on the audience that sees the banner during the game.

Much in the same way as the NBA should be allowed to be compensated for its efforts in putting together an event with such a large audience, a building owner should be permitted to be compensated for its efforts in putting together a building of tenants which LECs want to serve. A fair valuation of those efforts is not based on a square footage rental, but rather on other factors such as, the number and type of tenants, the density of telecommunications users in the building, and the number of hours that the offices use telecommunications services — the higher these factors are, the greater the benefit to an LEC of being given access to the building regardless of the square foot rental the building owner charges its tenants.

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[71] Further Comments, App. H at 12-13.

Moreover, according to comments submitted by SBPP, the value of the market for local telecommunications services in buildings that would be subject to any rules "will probably be a $36 billion market."[72] The value of this market is further indication that the proposal set forth in the FNPRM and supported by some of the commentators would not fairly compensate building owners. At a typical rent of 5% gross revenues, comparable to shopping center rents and the cable franchise fees permitted by the Act, the CLECs effectively propose a taking of property worth roughly $1.8 billion.

In sum, none of the commenters comes close to providing the Commission with a way of evading its obligations under the Fifth Amendment.[73]

VII. EXCLUSIVE CONTRACTS ARE VITAL TO ENSURING THE LONG-TERM PROSPECTS FOR COMPETITION IN THE RESIDENTIAL MARKET.

Exclusive contracts are often the only way to overcome the inherent economic barriers that inhibit competitive provision of advanced telecommunications service in hard-to-serve residential buildings. For that reason, the Commission should not ban them.[74]

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[72] SBPP Comments at 7 (*citing* Mark Rockwell, *BLEC's Two Sided*, tele.com at 1 (Oct. 24, 2000).

[73] In this regard, we note that, contrary to the Comments of AT&T at n. 19, the rule of *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) is alive and well. The D.C. Circuit reaffirmed the rationale of that case in *GTE v. FCC*, 205 F.3d 416, 420 (D.C. Cir. 2000). Therefore, the mere fact that the Commission has had to repeatedly consider the Fifth Amendment issue and correctly expressed concern over the possibility of a taking is sufficient to foreclose regulation.

[74] We note that in the cable inside wiring proceeding, CS Docket No. 95-184, the Commission acknowledged that exclusive contracts may be pro-competitive in the video service market. Many commenters appear to be addressing video issues in this proceeding. We believe the issues and economic incentives are largely the same, but the Commission should not act without understanding that it is dealing with different services in different markets, and not all the commenters are being as clear about their goals and concerns as they might be. In any case, because the focus of this proceeding has been on telecommunications, any action that might affect the video market should be dealt with in the context of the cable proceeding.

In previous filings, the Alliance and other parties submitted evidence that exclusive contracts were valuable and necessary to enable competitive providers to overcome the dominant market position of incumbent providers.[75] In response to the FNPRM, the Alliance questioned both the need to extend the ban, and the Commission's general authority to do so.[76] Other parties focused on the evidence that exclusive contracts are necessary to maximize the economic feasibility of providing service to what we will refer to as 'second-tier' residential buildings, *i.e.*, (i) smaller apartment buildings, (ii) apartment buildings in smaller, less densely populated areas, and (iii) buildings with tenants who are unlikely to pay for high-end bundled service packages.[77] Provision of advanced telecommunications service to 'second-tier' residential buildings will not occur without the benefits that exclusive contracts provide -- it is simply too expensive to build out these buildings without some means to equalize the higher per-customer cost.[78]

Some parties, however, have complained that incumbent providers are now using exclusive contracts to further leverage their entrenched market dominance.[79] Led by RCN, these commentors urge the Commission to extend the ban on exclusive contracts to residential buildings. These parties also make clear that their business plans for the residential market are designed to keep per-customer costs low by primarily marketing high-end bundled service packages to tenants residing in relatively large residential buildings in densely populated areas.[80]

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[75] *See, e.g.,* Declaration of Lyn Lansdale, Exhibit E to Further Comments.

[76] Further Comments at 62-65.

[77] CAI Comments at 2, CoServ Comments at 3-4, ICTA Comments at 12-13.

[78] ICTA Comments at 11.

[79] RCN Comments at 14-17.

[80] *See* RCN Comments at fns 14, 17.

Overall residential building tenant satisfaction with the availability, quality, and price of their telecommunications service should be the paramount interest of the Commission. RCN, however, wants the Commission to adopt regulations that support its business model, which is to build large networks and sell higher-priced bundled services in large apartment buildings.[81] Smaller competitive service providers want the Commission to adopt regulations that support their business model, which is to provide discrete services to all tenants in a smaller number of "second-tier" buildings (although they will serve larger, more lucrative buildings if the opportunity arises).[82] RCN wants to sell its bundled service, and therefore has trouble getting into buildings where the cable operator or another provider is providing a single service on an exclusive basis. Instead of examining business models, however, the Commission should determine whether tenants, not service providers, benefit from exclusive contracts. Unless and until the Commission has conclusive evidence that the use of exclusive contracts is harming the ability of residential tenants to receive advanced telecommunications services, the Commission should not attempt to extend the ban on exclusive contracts to residential buildings.

The Commission must also consider the highly diverse and fragmented nature of the apartment market. The apartment market is essentially a collection of 25 or more sub-markets, each with unique demographic characteristics: luxury, higher income, upper middle income,

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[81] RCN Comments at 9. RCN quotes the Commission's characterization of its business plan with approval: "RCN's business plan, for example, is 'dependent upon delivering bundles of services thus generating multiple revenue streams and higher penetration rates...[by]... entering markets with high population densities, thus lowering the per customer cost of offering service.'" RCN Comments at note. 15. Similarly, Carolina Broadband states that they are focused on gaining access to the largest buildings in each market. RCN Comments at 7.

[82] For example, CoServ is a small Texas-based competitive provider that relies on acquiring exclusive access to buildings, in return for offering the tenants reduced rates, state-of-the-art technologies and service, etc. CoServ Comments at 3. Unlike RCN or Carolina Broadband, the bulk of CoServ's assets are sunk in the building. CoServ cannot benefit from access to unlimited buildings; its business model requires making the most out of each individual building. *Id.* at 4.

lower middle income, upper low income, low income, high-rise, mid-rise, garden, rural, suburban, small city, large city, and so on. The size, location and income profile of a building all affect its attractiveness to video providers. Consequently, one set of rules could have a devastating effect on competition in many of those sub-markets. If the FCC adopts rules that favor RCN's strategy, it may advance competition for the 20% or so of buildings at the high end, but at the cost of disrupting competitive forces operating in the remaining 80%.

To the extent that permitting the use of exclusive contracts presents some possibility of abuse by incumbent providers, any abuse could be curbed by such measures as prohibiting incumbent providers from unilaterally imposing exclusive access as a condition of service; and shortening the term of exclusive contracts to the period necessary for a provider to recover its investment.

RCN appears to have some evidence of such abuse.[83] RCN's comments, however, do not change the fact that exclusive contracts remain vital to the efforts of building owners to attract, and competitive service providers to offer, advanced telecommunications service in 'second-tier' residential buildings. Small competitive service providers are only willing to serve 'second-tier' residential buildings if building owners grant the exclusive access that makes such service economically feasible. In return, as the comments demonstrate, competitive service providers are willing to offer tenants innovative, specially-tailored, and/or specially priced telecommunications and video service packages.[84]

RCN asserts that lack of choice itself justifies prohibiting exclusive contracts entirely. There is no argument that one purpose of the 1996 Act was to encourage competition and growth

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[83] RCN Comments at 5-8.

[84] ICTA Comments at 11-12.

of competitive services. But if the Commission were to eliminate exclusive contracts, consumers would lose access to a range of other providers that rely on the exclusive contract to serve 'second tier' buildings. Several parties stated that extending the ban on exclusive contracts to residential buildings would result in making it difficult to provide certain buildings with telecommunications service. PrimeLink argues that small and rural providers should be permitted to maintain exclusive contracts.[85] PrimeLink has entered into a contract to provide exclusive telecommunications service to an Air Force base that is currently being redeveloped. PrimeLink spent $3 million in reliance on an exclusive contract, and also obtained a $10.5 million loan in reliance on that contract. The Community Associations Institute supports exclusive contracts because they benefit condominiums and homeowner associations.[86] And finally, several parties note that their exclusive contracts were obtained through a competitive bid process and that there are specific benefits that they can only obtain through use of exclusive contracts.[87] In the video provider context, in previous filings, the Alliance provided the Commission with evidence that exclusive contracts permit building owners to negotiate for special cable package features, from addition of A&E to the basic cable package for seniors living in retirement communities, to movies-on-demand channels in buildings with primarily young professionals as tenants.

Furthermore, although RCN attacks the use of exclusive contracts, RCN engages in the practice itself.[88] And there is no evidence that RCN would be willing to make the investment to

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[85] PrimeLink Comments at p. 3.

[86] CAI Comments at 2.

[87] Educational Parties Comments at 10-11; County of Los Angeles Comments at 4, 7-8; U.S. Dept. of Defense Comments at 2, 4-6; IMCC Comments at 5-6.

[88] Bruce Mohl and Patricia Wen, "Sweetheart Deals Said to Limit Choices for Net, Phone, Cable," Boston Globe (Jan. 30, 2000), p. B2.

compete head-to-head in a building already served by an ILEC or cable MSO. RCN might be willing to in the largest, most lucrative buildings -- but not in the bulk of apartment buildings in the country. In determining whether or to extend the ban on exclusive contracts to residential buildings, the Commission must weigh the common or collective good enjoyed by all tenants in a residential building when an exclusive contract is negotiated for their benefit, against the individual good of the privilege of a few service providers to serve a few residents within a building. In other words, by agreeing to accept one provider, smaller or less desirable residential buildings may be able to receive comparable services to those offered in large residential buildings, services which might otherwise not be available. For smaller competitive service providers, who offer lower priced packages and rely on quantity on subscribers to become profitable, exclusive contracts are essential to survival.[89]

This form of bundling tenants together to receive better pricing is similar to the bundled service pricing plan offered by RCN. If a tenant agrees to forgo use of other providers, and accept RCN as his or her single provider for local telephone, long distance, cable and internet access, RCN will offer the tenant substantial discounts.[90] RCN further contends that if an incumbent is permitted to enter into an exclusive contract to provide any communications service, the new facilities-based entrant will be foreclosed from the market because the new entrant must be able to compete for all potential services.[91] RCN asks the Commission to prevent residential building tenants from receiving any of the current benefits under an exclusive contract on the grounds that someday a new facilities-based entrant might want to connect a

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[89] CoServ Comments at 5.

[90] RCN Comments at 9. "For example, RCN's bundled service offering, called Resilink™, offers subscribers substantial discounts for subscribing to more than one service."

[91] RCN Comments at 13-14.

particular residential building, but only if the new entrant can be assured of the possibility of selling a full bundle of services. RCN ignores the possibility that either through competitive bid, or by shopping around, it is possible that the building owner chose the best package it could find, and agreed to the exclusive contract provision to reduce rates even more.

The Telecommunications Research Action Center ("TRAC") opposes exclusive contracts because they limit the provision of telecommunications services to renters, who TRAC states are predominately poor and non-white.[92] The trouble with this argument is that most competitive service providers are not interested in serving buildings with low income residents. For example, RCN wants to provide bundled services because its average per customer revenue jumps from $88 per month for a la carte services, to $125 per month for provision of bundled services.[93] The only way a service provider will have an incentive to serve buildings with low-income residents is if it can be assumed that it will have a large customer base in the building, to make up for the lower rates residents will be able to afford.

RCN contends that existing systems will not be upgraded without the threat of competition, and that exclusive contracts provide "powerful weapons that preserve a *status quo* for providers of outdated and overpriced network facilities."[94] The Alliance agrees that shortening the length of exclusive contracts to the period necessary to provide a reasonable return on investment would be a sensible change.[95] But otherwise, RCN provides no evidence that exclusive contracts do not provide competitive service providers with incentive to build new

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[92] TRAC Comments at 2.

[93] RCN Comments at fn. 17.

[94] RCN Comments at 12-13.

[95] Although this begs the question of what that term would be, how it would be computed, and whether the FCC is equipped to deal with the issue.

networks by ensuring that they will be able to recover their investment. In fact, other comments provide evidence of exactly this point.[96]

Finally, the Alliance would also like to correct two misstatements made by RCN in its comments. It is the service provider that usually requires the residential MTE owner to grant the provider exclusive access as condition of providing service, not the other way around. Residential building owners enter into exclusive contracts because the service provider requires exclusive access to ensure that it will generate enough market share within the residential building to recoup its capital costs and reasonable profit.[97] In other cases, where competitive service is not available, the owner may have no choice but to agree to an exclusive access condition as required by the incumbent service provider. In either case, there is no stunning "rush to sign exclusive contracts by MTE owners."[98]

Second, RCN states building owners cannot be expected "to act in their tenants' best interests."[99] As stated in previous comments to the Commission, building owners have strong economic incentives to satisfy the telecommunications needs of their tenants. Revenues from telecommunications-related services represent only a tiny share of overall building income, and the loss of even one resident because of poor telecommunications service would be just too costly. The bulk of building income is derived from rent. The only way for building owners to keep their vacancy rates low and their rents at market, is to accommodate the needs of their tenants.

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[96] PrimeLink Comments at 2.

[97] ICTA Comments at 10.

[98] RCN Comments at iii.

[99] RCN Comments at 18.

The bottom line is that some limited evidence has been provided to demonstrate that some providers are being denied access to relatively large residential buildings. No evidence has been provided to demonstrate that tenants are being denied services from a provider with an exclusive contract that they would otherwise receive from an alternate provider. Yet strong evidence exists to demonstrate that exclusive contracts enable smaller buildings, which would not otherwise be financially attractive to competitive service providers, to negotiate innovative service packages for their tenants. Over 50% of apartment properties have 50 units or less. Exclusive contracts remain vital to the efforts of building owners to attract competitive service for their residential tenants. The Commission should not prohibit exclusive contracts without substantial evidence that the majority of residential tenants are harmed by the use of exclusive contracts.

VIII. COMMENTERS GENERALLY OPPOSE REGULATION OF PREFERENTIAL MARKETING ARRANGEMENTS.

Nearly all of the commenters support preferential marketing arrangements, including some who would ban exclusive contracts.[100] The Alliance shares the view that preferential agreements allow providers to differentiate themselves and thereby promote competition.[101] The Commission should not attempt to regulate preferential agreements.

IX. STATE BUILDING ACCESS REGULATIONS ARE NOT APPROPRIATE MODELS FOR COMMISSION ACTION.

The FNPRM requested comments on state rules regarding access to buildings. Interestingly, few of the commenters discussed those rules. There appears to be no consensus

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[100] *See* Comments of RCN, AT&T, SBC.

[101] *See* Comments of PrimeLink, CAI, ICTA.

even among the CLECs on this issue. In any case, the state models are all flawed because they ignore the economics of serving buildings, especially residential buildings. They assume, with little analysis, that forced access will yield competition, without considering the fact that in most cases multiple providers actually will not be able to serve residential buildings profitably. The most important thing that can be said about activity at the state level is that the vast majority of states have seen no need to adopt such rules.

A. Texas.

SBPP endorses the Texas model without noting the contradiction between that model and SBPP's stated position. The Texas rules apply only after a tenant has requested service from a particular provider, and do not give providers the right to preposition their facilities. If this is "satisfactory" to SBPP,[102] we wonder why SBPP continues to insist on "nondiscriminatory " access without a tenant request. We also note that the Building Tenant Survey as well as substantial information already in the record show that building owners respond to tenant requests for service. SBPP also ignores the fact that the Texas rules were adopted under express authority granted by the Texas legislature.

In any event, the Texas model is seriously flawed for several reasons. First, it would require direct FCC adjudication of "discrimination" complaints. The Commission cannot do this in a timely manner. The model also presumes that the Commission has direct authority over building owners and can enter orders setting compensation and other terms binding on owners. As discussed in our Further Comments, the Commission cannot do this.

Second, the Texas rules establish seven factors to be used in setting compensation to be paid to a building owner. These factors would potentially tie compensation to the amount of

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[102] SBPP Comments at 35.

space to be occupied in the building and the rate for tenant space in the property. Other factors include the value of the property before and after installation of the facilities; any potential loss to the owner form giving up the space; and the building owner's costs related to installation of the equipment; among others. The list is incomplete and several of the factors are entirely inappropriate.[103]

When a building owner allows a provider to occupy space in a building in a competitive environment, the building owner is entitled to be paid a fair market rent for the space. The Texas factors are designed not to set a fair market rent, but to create arguments for reducing the amount to be paid the owner. The list omits the single most important factor in setting rent, which is the value to the provider of obtaining access to the building.[104] As noted earlier, building owners expend large sums of money to create environments that are attractive to tenants, and therefore to service providers. Telecommunications providers use access rights to reap great rewards from the building owner's efforts, and because they use access rights not to store inventory or house employees but to deliver services, they use the underlying property in a way fundamentally different from that of ordinary tenants. Providers have been willing to pay rent based on gross revenues because they understand that the value of access to a particular property is tied directly to its revenue potential. The value of access to an office building to deliver telecommunications

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[103] It is important to keep a critical distinction in mind. When a property owner lets a telecommunications provider occupy space in a building on a periodic basis, as is typical under a license or similar arrangement, the provider is paying rent; the provider is not paying compensation for acquiring a permanent property right. Consequently, the compensation must be evaluated in the context of how rent is typically determined. If a provider wants the benefit of a permanent right to occupy the property, it must either purchase an easement or condemn an easement, in which compensation will be set using different standards. The factors do not consider this issue at all, and indeed seem to blur the distinction. For one thing, the grant of a permanent right will presumably cost more than a temporary one.

[104] *See, e.g., Rodriguez v. Costa Rica*, 99 F.Supp. 2d 170 (D.P.R. 2000) (rent for commercial use of property greater than for residential use of same property).

service is analogous to the value of a retailer's right to occupy space in a shopping center, because it provides direct access to a large body of potential customers.[105]

Consequently, the market rate for tenant leasable space in a property is of little value in setting the rent for a telecommunications provider's access rights; the uses are too different to be comparable. Similarly, while a building owner may seek to ensure that the costs associated with a provider's presence are covered, those costs ultimately may have little to do with the actual rent to be paid.

It is also important to bear in mind that in a free market, rent will be based on negotiations, and all parties are presumed capable of determining and protecting their own interests. Owners know that they have to have telephone service in a building, and will take that into account in dealing with a provider. But it is indisputable that the presence of the tenth provider offers the owner less than the presence of the first. The Commission cannot adequately set a value on such matters, at least not any more efficiently than can market negotiations. The Texas list's omission of the value to the provider perfectly illustrates why the government should

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[105] *See, e.g., A.H. Phillips Co., Inc. v. Commission*, 36 T.C.M. (CCH) 638 (1977) (noting that volatile businesses will pay high percentage rents and relatively low fixed rents); 12 Thompson on Real Property, Thomas Edison (David A. Thomas, ed. 1994), § 97.06(c)(16)(ii); Saft, Commercial Real Estate Leasing (1992), § 3.06; Powell on Real Property (2000) ch. 17A.

not try to regulate building access.[106]

B Massachusetts.

The Massachusetts rules were briefly mentioned by AT&T, but as far as the Alliance could determine, were not endorsed by any party. In any event, those rules are flawed for several reasons, chiefly because they rest on the DTE's counterintuitive conclusion that the term "utility" in the Massachusetts pole attachment statute includes building owners. The rules have been challenged in court by the Alliance and local real estate associations and we expect them to be overturned.

C. Connecticut.

The Connecticut rules also have not been endorsed by any party, and as far as we know have never been applied. Accordingly, it would appear that even the CLECs do not consider them a useful model. Furthermore, the Connecticut rules were adopted pursuant to a statute that expressly acknowledged that the rules would effect a taking of private property and consequently

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[106] SBPP's proposal that the Commission set benchmark rates for building access is wholly unworkable. SBPP comments at 38. Ironically, SBPP's example of cable rate regulation illustrates this perfectly. The Commission's cable rate regulation scheme proved to be utterly ineffective: it imposed administrative burdens on cable operators and local franchising authorities, while doing nothing to limit rate increases, and the Commission has proven unable to resolve rate dispute in anything close to a timely manner. Furthermore, as we noted in the Further Comments, the FCC processes such complaints very slowly. Our analysis of cable rate decisions issued in 2000 shows that on average, it took the FCC 64 months to complete its review. Further Comments, Ex. I. Our most recent analysis of all cable rate orders is more favorable: it appears that, on average, it has taken the FCC 19 months to decide cable rate cases. This is still inordinately long, and far longer than the 3-6 months the market takes to resolve building access negotiations. We cannot think of a worse model. We support that it takes the Commission at least as long to handle other types of cases, including OTARD petitions and pole attachment cases. The FCC is simply not capable of resolving disputes quickly or efficiently.

authorized the Department of Public Utility Control to set compensation. The FCC has no comparable authority.

D. Nebraska.

The only parties to endorse the Nebraska rules appear to have been Cox, which was instrumental in having them adopted, and SBPP.[107] The Nebraska rules apply only to residential property. In addition to banning exclusive contracts, Nebraska provides for moving the demarcation point to the minimum point of entry, and for allocating the cost of wiring if the MPOE is moved. The decision to ban exclusive contracts in residential buildings was an unfortunate error, for the reasons discussed above. The rules offer no benefit to tenants, and are not a useful model for the Commission.

E. Florida.

The Florida Public Service Commission ("FPSC") filed comments urging the FCC to ban residential exclusive contracts and making suggestions for nondiscriminatory access rules, among other issues. The FPSC alleges that "[e]xclusionary contracts bar access to tenants by any competitors. Exclusionary contracts are inherently anticompetitive and should, therefore, be prohibited...."[108] This statement has no basis in fact, and is purely an expression of uninformed opinion. The report cited by the FPSC is conclusory and contains no analysis to justify such a statement. In addition, we note that the FPSC never adopted rules of its own, despite having conducted an extensive examinations of the issue. The FPSC's recommendations are now two years old, and the state legislature has never acted on them.

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[107] Cox Comments at 15; SBPP Comments at 33.

[108] FPSC Comments at 2.

X. SBPP MISSTATES THE NATURE AND EFFECT OF THE REIT MODERNIZATION ACT.

Faced with the prospect of competition from BLECs, who have developed a different business model, many CLECs fear that their strategy of building duplicative transmission infrastructure and treating building owners as adversaries may be ineffective, compared to a cooperative strategy that emphasizes providing facilities and services that tenants need. Consequently, they have resorted to alleging that building owners and the BLECs have created an anticompetitive alliance, and that the only way to stop this alleged juggernaut is to grant traditional CLECs access to buildings on their own terms.

As we stated in the Further Comments, the RAA's purpose is to protect the property rights of building owners, and we believe that the BLECs can defend themselves perfectly well. We also believe that the Commission will recognize that BLECs still represent only a small part of the market, and that their business practices and relationships with building owners will provide competition and benefit end users. Nevertheless, SBPP has made one particular claim regarding the REIT Modernization Act (the "RMA") that must be corrected.

SBPP alleges that the RMA (1) allows REIT subsidiaries to provide telecommunications services without jeopardizing their tax status; (2) consequently, the BLEC industry will experience "staggering growth;" and (3) consequently, building owners are well-positioned to exploit their "access-to-tenant" bottleneck."[109]

These three statements are at best misleading, and at worst false. To begin, some background. When Congress created REITs in 1960, it recognized that it was necessary for a building owner to provide basic services to make the living space habitable. Thus, Congress

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[109] SBPP Comments at 7-8.

authorized REITs (even though they were originally intended to be "passive" in nature) to provide either directly or through a third party basic services such as electricity, water, air conditioning and telephone service. The Internal Revenue Code and relevant Treasury Regulations characterized any income generated from such services as "rents from real property," a key requirement for being a REIT.

Over the years, the IRS issued guidance clarifying which services qualified as utilities, such as a REIT using its own PBX to provide telecommunications services or a REIT submetering electricity or water.[110] In 1996, the IRS issued the first private letter ruling that concluded that an apartment REIT could provide cable television services to its residents under the theory that cable television was similar to the utility services long recognized as customarily provided by building owners.[111] In January 1999, the IRS issued Private Letter Ruling 199914038 concluding that an office REIT can provide (either directly or though a joint venture with a third party) high speed Internet and similar services to its tenants. Again, the IRS concluded that these services were akin to utility services.[112]

Congress enacted the REIT Modernization Act of 1999 to simplify a REIT's organizational structure and to allow a REIT to offer "cutting edge" services to its tenants through a taxable corporation:

> The Committee believes, however, that certain types of activities that relate to the REIT's real estate investments should be permitted to be performed under the control of the REIT, through the establishment of a "taxable REIT subsidiary" where there are rules which limit the amount of the subsidiary's income that can be reduced through transactions with the REIT.... One type of

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[110] *See, e.g.*, Treas. Reg. § 1.856-4(b)(1); Rev. Rul. 74-353, 1974-2 C.B. 200.

[111] *See* Priv. Ltr. Rul. 9640007 (June 26, 1996).

[112] *See also* Priv. Ltr. Rul. 200103033 (Oct. 17, 2000); Priv. Ltr. Rul. 200101012 (Sep. 30, 2000); Priv. Ltr. Rul. 200052028 (Sep. 29, 2000); Priv. Ltr. Rul. 199935071 (June 3, 1999); Priv. Ltr. Rul. 199917039 (Jan. 29, 1999).

> activity is the provision of tenant services that the REIT wishes to provide in order to remain competitive that might not be considered customary because they are relatively new or "cutting edge". The Committee believes that provision of tenant services by taxable REIT subsidiaries will simplify such rentals operations since uncertainty whether a particular service provided by a subsidiary is "customary" will not affect the parent's qualification as a REIT.

S. Rep. No. 106-201, 57-58 (1999).

Now, as to SBPP's specific claims. First, the RMA did not authorize REITs to provide telecommunications services to their tenants. Private Letter Ruling 1999141038 was issued well before the RMA was enacted in November 1999. In other words, although the RMA authorizes REITs to establish subsidiaries to provide certain kinds of services, it did not authorize REITs to provide telecommunications services without jeopardizing their tax status because they already had the ability to do so directly. SBPP is aware of this, because a few weeks before the RMA was enacted, representatives of several leading CLECs asked Congress to amend the RMA to condition a REIT's use of a taxable REIT subsidiary ("TRS") on the TRS adopting a "nondiscriminatory" standard in providing telecommunications services. Congress rebuffed these efforts after NAREIT and a Treasury Department official educated policymakers that a TRS was not necessary to provide telecommunications services because REITs could do so without the use of a TRS. For that reason, although it is possible that REITs may choose to use TRSs to provide telecommunications services to third parties, there would be no need for a REIT to establish a TRS to serve its own tenants.[113]

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[113] In addition, even with the changes made in the RMA, a REIT can hold up to 10% of the vote or value of the stock of another corporation without regard to whether that corporation elects TRS status. To our knowledge, no REIT owns more than 10% of the stock of a BLEC, so that a REIT may continue to do so. We are unaware of any instance in which a REIT has transferred its stock in a BLEC to a TRS.

Second, the RMA does not encourage REITS to invest in BLECs, and will not cause BLECs to grow at a "staggering rate." Many REITs had invested in existing BLECs before the RMA was enacted, so the RMA has little, if anything, to do with that phenomenon. It is true that few, if any, REITs provided high speed Internet or other advanced services to tenants until the IRS issued its January 1999 private letter ruling. The IRS has issued a number of rulings since then allowing such services, so it appears that more REITs are interested in providing these services to tenants – this is not staggering growth, however. Indeed, NAREIT reports that its members estimate that the total revenue from all sources for TRSs in 2001 will amount to less than 5% of the REITs' total revenue. Since telecommunications revenue will be dwarfed by other TRS sources of revenue (such as management fees for operating property for other owners), this means that TRS telecommunications income in 2001 should be miniscule. Even if it grows over time, this will not be a large sum in the context of the overall priorities and income of REITs. Consequently, it is unlikely that the RMA will dramatically alter the telecommunications landscape.

Finally, the large majority of office and residential buildings are owned by privately-held companies, rather than REITs. Consequently, even if REITs did have certain incentives or ultimately behaved in ways that might concern CLECs, the RMA will have no effect on non-REIT owners. Thus, to claim that the passage of the RMA poses an enormous threat to competition and will encourage building owners to "exploit" their alleged "bottleneck" is a vast exaggeration.

CONCLUSION

Tenants are getting the services they want. Building owners are giving CLECs and other providers access to buildings, in response to tenant demands. Commission regulation of building access is unnecessary. This proceeding should be terminated.

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LIST OF EXHIBITS

EXHIBIT A	Implementation Report
EXHIBIT B	Lyle Declaration
EXHIBIT C	Business Tenant Survey
EXHIBIT D	Boston Globe Article